Filed 2/17/05 In re Christian R. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re CHRISTIAN R., et al., Persons Coming Under the Juvenile Court Law.	B176798 (Los Angeles County Super. Ct. No. CK07034)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANTHONY L., et al., Defendants and Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Valerie L. Skeba, Juvenile Court Referee. Affirmed.

Andre F. F. Toscano, under appointment by the Court of Appeal, for Defendant and Appellant Anthony L.

John L. Dodd & Associates and John L. Dodd, under appointment by the Court of Appeal for Defendant and Appellant Sylvia R.

Raymond G. Fortner, Jr., County Counsel, Larry Cory, Assistant County Counsel, and Sterling Honea, Principal Deputy County Counsel, for Plaintiff and Respondent.

Appellants Anthony L. (Father) and Sylvia R. (Mother) appeal from an order terminating parental rights under Welfare and Institutions Code section 366.26, subdivision (b)(1).[1] They contend the order should be reversed on appeal because there was a conflict of interest among the six children who were all represented by one attorney, and appellants and the children respectively received ineffective assistance of counsel. Notably, none of the children has joined in this appeal, and none of the children asserted a conflict of interest at any time after the trial court appointed private counsel, Jacques A. Love, to represent the children.

Respondent Department of Children and Family Services (DCFS) contends Mother's appeal is untimely. It also contends appellants have no standing to assert the alleged conflict; they waived the argument by not raising it in the dependency court below; and there is no conflict. We consider here but decline to decide whether appellants have standing to assert any conflict of interest arising from counsel's representation of all the children, because appellants forfeited the claimed error by failing to assert it in the trial court. Even if we were to consider the merits of the appeals, we would find there was no conflict of interest warranting reversal of the order terminating parental rights.

BACKGROUND

The Facts

On July 6, 2001, DCFS filed a section 300 petition on behalf of Christian R., Allan S., Michael S., Angel S., Anthony L., and Isaac L. (§ 300, subd. (b) [failure to protect], and (j) [abuse of sibling].) It alleged that due to parental neglect, Christian was hospitalized for malnutrition.

On September 10, 2001, the children's counsel asserted a conflict as to all of the children except Christian. The court ordered her to continue representing Christian and appointed another attorney to represent the other children. Mother and Mother's counsel

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[1] All further statutory references are to the Welfare and Institutions Code.

were present in court when counsel declared a conflict and new counsel was appointed for the other five children.

The court found the children were dependents under section 300, subdivisions (b) and (j), based on the allegations that Christian was found sleeping in a Wal-Mart store warehouse unaccompanied by an adult; he was emaciated and was hospitalized for malnutrition, a condition due to Mother's failure to provide adequate food and supervision; and this not only endangered his physical and emotional health and safety, but also placed his siblings at risk of harm. The children were placed in three separate foster homes.

On December 20, 2001, appellant Anthony L. made his first court appearance and declared that he had fathered Anthony and Isaac. Subsequently, it was determined that appellant Anthony L. is the same person who is also known as Fernando S., the father of Alan, Michael, and Angel. Christian's father, Gabriel S., could not be located. Father had been living in Iowa but recently moved back to California.

Mother arranged to occupy an apartment in Lancaster that had been rented by another, unrelated woman. The court transferred the case to the Lancaster court and ordered that new attorneys be appointed for the parties in Lancaster. On May 6, 2002, the Lancaster court accepted the case transfer. The Lancaster court was aware that Christian had separate counsel and, after relieving counsel for Christian and counsel for the other five children, the court appointed Jacques Love to represent all six children, without objection. No lawyer for any of the children has ever raised any claim of conflict since the case was transferred to Lancaster.

On November 7, 2002, the court adopted DCFS's recommendations that Christian, Alan, Michael, and Angel be returned home to Mother, family maintenance services be ordered, and Anthony and Isaac remain suitably placed. Mother gave birth to another child with Father, Sarah L., on November 26, 2002. The court ordered that Anthony and Isaac be placed in Mother's home with all the other children on January 6, 2003.

Approximately three months later, Isaac was found dead in Father's van while in the care of appellants. His body was secreted in a plastic garbage bag. He died due to

the combined effects of pseudoephedrine, multiple injuries, and asphyxia. Appellants were arrested and charged with first degree murder.

On April 28, 2003, DCFS filed a petition on behalf of Sarah under section 300, subdivisions (a) (serious physical harm), (b) (neglect), (f) (parent caused child's death by abuse or neglect), and (j) (abuse of sibling). The court appointed Mr. Love, who was already representing the other children, to represent Sarah, without objection. All of the children were detained. Anthony and Sarah were placed with a foster mother on April 23, 2003. Christian, Alan, Michael, and Angel were also placed with her on May 16, 2003. In June 2003, DCFS filed a first amended petition with respect to the other five children, alleging the danger arising from the murder of a sibling and that both Mother and Father had beaten the children on recent prior occasions.

An adoption assessment report dated July 7, 2003, stated that Christian (age 13) and Alan (age 11) wanted to be adopted if they were not returned home. Michael (age 9) wanted to return home, and Angel (age 6), Anthony (age 3), and Sarah (8 months) were too young to express their wishes.

On July 17, 2003, the court sustained the petition as to Sarah under section 300, subdivisions (b), (f), and (j), and the amended petition as to the other five children, based on the allegations that Father fatally abused Isaac, Mother failed to protect Isaac, which led to his death, and Mother gave the police false information. The court denied family reunification services.

In a section 366.26 report dated November 13, 2003, DCFS reported that the children's foster mother was interested in adopting all of them "in order to keep the sibling group" together permanently. The children were happy to be living together in the same home. Their foster mother, who had cared for the children for six months, had developed a loving relationship with them. She was in very good physical and mental health. DCFS found her to be "willing and able to adopt [each child] and provide them with a stable and loving home environment."

Christian reported that he liked living with his foster mother and wanted her to adopt him. Alan hoped to reunify with his mother upon her release from jail, but stated

that his foster mother was the best foster mother he had ever known. Michael stated that he also liked living with his foster mother and siblings, and that if he could not live with Mother he wished to remain with his foster mother. The younger children could not offer any meaningful statements regarding their feelings about adoption.

In a status review report dated January 15, 2004, DCFS stated that the four older children all reported that they were happy to be living in their foster mother's home. Christian, Alan, and Michael wanted to live with her "for the rest of their [lives]" if they were never returned to Mother's care, and stated that it would be okay if she adopted them. Their foster mother remained interested in adoption.

Dr. Karen Booty, the children's therapist with the Crime Victim Counseling Center, reported in February 2004 that Christian, Alan, Michael, Angel, and Anthony said that they were happy in their foster home and accepted that their foster mother was going to adopt them. Michael demonstrated "some resistance" to the adoption, but he indicated that he trusted his older brothers' acceptance of adoption by their foster mother. In April 2004, Dr. Booty reported that the five boys "continue to show increased improvement in their emotional stability as they progress in their recovery from the trauma of their brother's homicide and their own physical abuse." She added that their imminent adoption "although eagerly anticipated, increases their overall stress level" since, in the children's minds, it posed termination of their relationship with their parents.

The court ordered DCFS to submit a supplemental report addressing the question of whether Christian and Alan, the only children aged 12 years or over, were in agreement with the adoption.[2] The supplemental report dated May 3, 2004, stated that Christian, Alan, and Michael continued to express their agreement with being adopted by their foster mother. They expressed a concern about being adopted since it would end their hopes of ever living with Mother again, but understood that adoption would "secure a permanent relationship with their siblings in the same home for the rest of their lives."

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[2] Under section 366.26, subdivision (c)(1)(B), the court may consider the objection of a child 12 years or older to the termination of parental rights in selecting a permanent plan for that child.

According to an addendum report dated May 24, 2004, Christian readily agreed to adoption, and Alan agreed to adoption after asking if he had to state a preference.

A home study was completed and approved.

Mr. Love appeared and represented all of the children at the section 366.26 hearing on May 24, 2004, without objection. He made no argument in favor of or against adoption. Appellants also appeared with their attorneys. Although the children were present in the courtroom, neither appellant's attorney requested that they testify. Appellants and their attorneys did not assert that any exception to the statute favoring adoption applied here. Mother and Father each made a statement to the court.

The court found that, essentially, appellants were asking for more time to try to get their children back. The court found, however, that appellants had received "lengthy reunification services," the case having come into the dependency system in July 2001, almost three years before the section 366.26 hearing. The court observed that the law required selection of a permanent plan and the plan should be adoption unless a statutory exception under subdivision (c)(1) of section 366.26 applied. The court found the children were adoptable and were living with the person who wished to adopt them, appellants had not maintained regular contact with them, and there was no basis to find the children would benefit from continuing a relationship with appellants. Accordingly, no exception applied, and the court terminated appellants' parental rights to all of the children.

The Governing Law

The Legislature has stated that California has an interest in providing stable, permanent homes for children who were removed from parental custody and who did not successfully reunify with their parents. (*In re Celine R*. (2003) 31 Cal.4th 45, 52.) The section 366.26 hearing is designed to safeguard a child's rights to be placed in a stable permanent home with a caretaker who will make a "'full emotional commitment to the child.' [Citation.]" (*Id.* at p. 53.) During the hearing the court may "(1) terminate parental rights and order that the child be placed for adoption . . . ; (2) identify adoption

as the permanent placement goal and require efforts to locate an adoptive family; (3) appoint a legal guardian; or (4) order long-term foster care. [Citation.]" (*Ibid*.)

Where possible, adoption is the first choice because it gives the child the best opportunity to have a fully emotionally committed caretaker. (*In re Celine R., supra*, 31 Cal.4th at p. 53.) Thus, if the child is likely to be adopted, the court must terminate parental rights and order placement for adoption absent the demonstration of compelling circumstances under which doing so would be detrimental to the child. (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368; § 366.26, subd. (c)(1).)

Statutory exceptions to the rule favoring adoption include where there are compelling reasons to find termination of parental rights would be detrimental to the child because: (1) the parents maintained regular contact with a child, who would benefit from the continuation of that relationship; (2) a child who is at least 12 years of age objects to termination of parental rights; (3) a child in a residential treatment facility is unlikely adoptable and continuation of the parental relationship would not interfere with finding him a permanent family placement; (4) a child is living with someone who is unable or unwilling to adopt the child due to exceptional circumstances, but who is willing and able to provide the child with a stable and permanent environment and removal of the child from that person would be detrimental to his emotional well being; and (5) termination of parental rights would substantially interfere with a sibling relationship. (§ 366.26, subds. (c)(1)(A)-(E).)

In *Celine R., supra*, 31 Cal.4th at page 60, the Supreme Court held, "A court should set aside a judgment due to error in not appointing separate counsel for a child or not relieving conflicted counsel only if it finds a reasonable probability the outcome would have been different but for the error." The court reasoned that, "Reversal of an order of adoption, for example, might be *contrary* to the child's best interest because it would delay and might even prevent the adoption. After reunification efforts have failed, it is not only important to seek an appropriate permanent solution -- usually adoption when possible -- it is also important to *implement* that solution reasonably promptly to minimize the time during which the child is in legal limbo. A child has a compelling

right to a stable, permanent placement that allows a caretaker to make a full emotional commitment to the child. [Citation.]" (*Id.* at p. 59.)

DISCUSSION

Timeliness of Mother's Notice of Appeal

DCFS contends Mother's notice of appeal is untimely. Mother filed notice of appeal on August 5, 2004, 73 days after issuance of the order terminating parental rights. Mother's counsel appeared to acknowledge that her notice of appeal was untimely when he filed it for her on August 5, 2004, noting that "notice of appeal was sent to mother in jail, mother either did not receive it or was not able to file it in a timely manner." Mother says nothing at all about the timeliness of her appeal in her brief on appeal. We cannot determine from the record whether Mother's appeal is timely or untimely.

Ordinarily, a notice of appeal must be filed within 60 days after the court orders the termination of parental rights. (Cal. Rules of Court, rule 1435(f).) However, where as here, a referee issued the order, the notice of appeal must be filed within 60 days after the order becomes final under rule 1417(c). Rule 1417(c) provides that, absent the filing of an application or an order for rehearing, a referee's order becomes final 10 calendar days after it has been served in conformance with rule 1416. Rule 1416(b)(3) requires that a copy of the order be served on the parent and his or her counsel.

Here, the record on appeal does not include the proof of service on Mother or her counsel of the referee's May 24, 2004, order terminating parental rights, nor is there any other record indicating that Mother was ever served with the order. Whether or not Mother's appeal is timely, we must consider Father's appeal which asserts the same conflict of interest and is timely.

Waiver/Forfeiture

Appellants contend that although neither they nor counsel for the children ever objected to the representation of their children by the same attorney, they have not waived this claim of error. Recently, our Supreme Court in *In re S.B.* (2004) 32 Cal.4th

1287, held that appellate courts have discretion to excuse forfeiture[3] of claimed errors in dependency cases "presenting an important legal issue." (*Id.* at p. 1293.) The mother in that case did not object to the trial court's order granting her child's legal guardian the authority to decide whether the mother could visit the child. The Supreme Court found dependency matters are not exempt from the rule that "a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.] The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*Ibid*.)

Observing, however, that application of the forfeiture rule is not automatic, the court cautioned that "the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue," and that "the discretion must be exercised with special care" in dependency cases, since they involve children and "considerations such as permanency and stability are of paramount importance." (*In re S.B., supra,* 32 Cal.4th at p. 1293.) The court found the appellate court did not abuse its discretion in entertaining the mother's challenge to the visitation order even though she did not object to it in the trial court because the case presented an important question of law: "whether a juvenile court in a dependency case may delegate to the child's legal guardian the authority to decide whether a parent may visit the child, a question that has divided the Courts of Appeal." (*Id.* at p. 1294.)

In *In re Elizabeth M.* (1991) 232 Cal.App.3d 553, the court found that a father did not waive the issue of the rights of three of his six children to independent counsel despite having failed to raise the issue before the trial court. Unlike this case, counsel for the three children also appealed the court's orders regarding reunification services and their permanent plan and raised the issue of attorney conflict of interest on appeal.

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[3] The court in *In re S.B., supra*, noted that although the term "waiver" is often used in reference to the loss of the right to challenge a ruling on appeal, "the correct legal term for the loss of a right based on failure to timely assert it is 'forfeiture,' because a person who fails to preserve a claim forfeits that claim." (32 Cal.4th at p. 1293, fn. 2.)

This case is distinguishable from *Elizabeth M.* because here, the children have not appealed the trial court's orders or asserted any claim of conflict of interest. Moreover, we cannot ignore the distinction that in *Elizabeth M.*, *supra*, the father was described as "sincere and caring," whose deficiencies were "that he saw only the good in others and refused to believe that his friends might have molested [one of his daughters]." (232 Cal.App.3d at p. 568.) Here, in contrast, appellants have been charged with first degree murder of one of their children. Applying the *In re S.B.* standard, this does not appear to us to be one of those rare cases that present an important legal question warranting departure from the rule that objections must be raised in the trial court so that any error may be corrected there.

Standing

DCFS contends appellants have no standing to claim a conflict of interest arose from Mr. Love representing all the children. Appellants contend that they have standing because their interests in preserving their parental relationship with their children are somehow intertwined with their children's claimed right to separate counsel. They also contend that the court terminated parental rights when it knew or should have known of a possible conflict of interest. Because we conclude that appellants forfeited the claim of conflict, we do not decide the standing issue on this appeal. We observe, however, that even if the claim had not been forfeited, it is unlikely either appellant would have standing to assert a conflict in this case.

DCFS acknowledges that "the standing issue appears unsettled" in the law. In *Elizabeth M., supra*, 232 Cal.App.3d 553, 565, in an appeal from an order selecting a permanent plan pursuant to section 366.26, the court found a father had standing to assert his children's right to independent counsel where some of the children's interests in maintaining a relationship with him diverged. In that case, the three younger children had conflicting interests, because some of them wanted to maintain their relationships with their parents and siblings, whereas reunification with the parents did not appear to be in the best interests of other children. Yet one deputy district attorney had represented

not only all six children but also initially represented the county department of social services, which had prosecuted the petition.

The *Elizabeth M*. court reasoned that the independent representation of the children's interests affected the father's interest in the parent-child relationship. (*In re Elizabeth M., supra*, 232 Cal.App.3d at p. 565, citing *In re Patricia E*. (1985) 174 Cal.App.3d 1, 6; *In re David C*. (1984) 152 Cal.App.3d 1189, 1206.) The *Patricia E*. court explained that where two parties have interwoven interests either party has standing to litigate issues affecting their interrelated interests. (*Patricia E.*, at p. 6.)

In this case, it does not appear that the children have any interests that are intertwined with appellants'. It is undisputed that, during their incarceration following their arrest for the murder of one of their children, appellants have not been permitted to have contact with the children. The children's foster mother is willing to adopt all of them, which will preserve the sibling relationships. None of the children object to being adopted. Appellants argue that if the children had separate counsel, their actual wishes would have been ascertained, but appellants were never precluded from presenting evidence about the children's wishes.

Moreover, their wishes were amply demonstrated in the numerous social worker reports and reports of therapists. Contrary to appellants' argument, there is no evidence that either Christian or Alan was pressured into favoring adoption. Alan was reluctant to state his feelings on one occasion, but after he was told that the court needed to know how he felt, he said he wanted to be adopted. We simply cannot discern any evidence in the record to suggest appellants' interests are interwoven with (as opposed to placing at risk) the interests of the children in having a safe and nurturing home.

Finally, with respect to the claim of ineffective assistance of counsel, appellants failed to establish that, but for the alleged failings of counsel, appellants would have received a more favorable result. Thus, we reject the ineffective assistance of counsel claim. (*In re Nada R*. (2001) 89 Cal.App.4th 1166, 1180.)

The children have a right to be placed in a stable, permanent home with an emotionally committed caretaker. Adoption by their foster mother will help insure that

they will have the opportunity to grow up together in a secure, permanent, and nurturing environment.

DISPOSITION

We affirm the order terminating parental rights.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.*

We concur:

HASTINGS, Acting P.J.

CURRY, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.